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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 995

HARRY SCHACKMAN; NATHAN DELUCA; and JOSEPH GROSS,

Appellants,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles

OPPOSITION TO MOTION TO AFFIRM THE JUDGMENT AND/OR DISMISS THIS APPEAL

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PRELIMINARY STATEMENT

Appellants have heretofore filed a Jurisdictional Statement in this Court. The Appellee has filed a MOTION TO AFFIRM THE JUDGMENT AND/OR DISMISS THE APPEAL. In the within doocument, the Appellants address themselves to several of the issues and contentions raised by the Appellee. Specifically, Appellants

desire to correct some misconceptions which could easily arise from Appellee's out of context citation of authorities or citation of only a portion of the relevant statements made by the various Courts involved.

ARGUMENT

On Page 5 of Appellee's Motion, there is cited *People vs. Williamson*, 207 Cal.App.2d 839, 847, 24 Cal.Rptr. 734; Cert. denied, 377 U.S. 994, 12 L.Ed.2d 1047 (1962) for the proposition that "the state is not debarred from regarding the trier of fact as the embodiment of community standards competent to judge a work challenged for obscenity against these standards."

It should be noted that the statement of the above proposition first occurred in the concurring and dissenting opinion of Justice Harlan in *Smith vs. California*, 361 U.S. 174, 80 Sup.Ct. 215, 4 L.Ed.2d 205. Justice Harlan was quick to point out, however, that "Such a view does not, of course, mean that the issue is to be tried according to the personal standards of the judge or jury." (4 L.Ed.2d 205, 221, footnote 3).

It is submitted that if the personal standards of the trier of fact is not to be used to try an obscenity case then, of necessity, some evidence other than the films in question must be presented to the trier of fact in order for them to have a rational basis on which to judge contemporary community standards.

United States vs. 392 Copies of Magazine "Exclusive", 253 Fed.Supp. 485, is cited in Appellee's Motion. While the case does state that some stimuli may be so elemental that the ordinary judge or juror should be able clearly

to recognize the nature of the appeal to the average man, it is also stated, at Page 493, that the nature of the material in question determines whether or not expert testimony is necessary to prove the probable reaction of the average man to the various stimuli. Appellants strongly disagree with Appellee that the films involved in the instant case provide stimuli that are "so elemental that the ordinary judge or juror should be able to recognize the nature of the appeal to the average man." Nor do Appellants agree, as stated on Page 7 of Appellee's Motion, that the "appeal to prurient interest [of the film involved in the instant case] is so basic that expert testimony of this appeal need not be presented."

Appellee also states that no testimony was necessary as to the films prurient appeal (citing the "Exclusive" case, *supra*). This only indicates that there is a conflict of authority in the Federal Courts, since *United States vs. Klaw*, 350 Fed.2d 165 (cited in Appellants' Jurisdictional Statement) holds that a showing of the films alone is not sufficient proof of the corpus delicti. The fact that a conflict exists presents a cogent argument for the court hearing the instant appeal and resolving the conflict.

Appellee states that the two films that were viewed by the jury at the behest of the Appellants were offered merely as a defense to the issue of scienter, but were not offered to enlighten the jury relative to community standards. (Appellee's motion to Affirm the Judgment and/or Dismiss the Appeal, p. 6). Appellants disagree with Appellee and affirmatively state that the films were presented to the jury for both of the referred to purposes.

Appellee also failed to mention that the case of *Schackman vs. Arnebergh*, 258 Fed.Supp. 983, from which a quotation is set forth in Appellee's Motion, is on appeal to this Court.

In the *Schackman* case, a declaratory relief suit was brought in the Federal Court under the Civil Rights Act asking for a declaration that the California Obscenity Statutes as applied and enforced were unconstitutional and violated the Federal Civil Rights Act. A further declaration was asked that the films and magazines presented in evidence be declared not obscene as a matter of law under the California "hard core" pornography statute and Amendments I and XIV to the United States Constitution. This was the first case that the Judge (newly appointed to the Federal bench) had ever handled in the pornography or obscenity field, either State or Federal. Not only did the Trial Court refuse to convene a three-Judge Court, which was required, but in addition the written Memorandum Decision of the Court went far beyond the issues raised and is, in this writer's opinion, an example of an unsophisticated, non-judicial, personal and moralistic attitude so commonly found among lay juries who, like the instant trier of fact, have had no prior personal (or judicial) experience with the material which was to be reviewed or the subject matter of constitutional protections under the First and Fourteenth Amendments.

Appellee, on Page 9 of its Motion, raises the issue that the evidence indicated that the Appellants knowingly exploited, pandered and titillated the public with the films in question. Besides the fact that such a statement is not

properly before the Court, in that only jurisdictional matters are at issue at the present time, Appellee's statement that Appellants were "knowingly engaged in the calculated purveyance of filth" (Appellee's Motion to Affirm the Judgment and/or Dismiss the Appeal, P. 10) is not supported by the evidence or law. Appellant Schackman is a proprietor of a lawful business licensed by the City of Los Angeles. It is clear that the decision in *Mishkin*[1] is directed not at a person engaged in a business such as Appellant Schackman, but rather at the large scale advertising and sale of obscene material.

Finally, *Stembridge vs. State of Georgia*, 343 U.S. 541, 96 L.Ed. 1130, is cited for the proposition that "where the highest court of the state delivers no opinion and it appears that the judgment might rest upon a non-federal ground, this court will not take jurisdiction to review the judgment." While Appellants cannot, of course, quarrel with the proposition cited in *Stembridge*, Appellants respectively submit that the rule of *Stembridge* should not be applied where it is almost a virtual certainty that the judgment of conviction and affirmation thereof were based on constitutional grounds. Interestingly enough, Appellee fails to state the non-federal ground on which the decision of the highest Court of the State of California may have been based, which may constitute a defect in its Motion.

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[1] *Mishkin vs. New York*, 383 U.S. 502, 16 L.Ed.2d 56.

CONCLUSION

It is respectfully submitted that the instant appeal should be heard by this Court if only to clarify the Court's position in *Mishkin vs. New York, supra,* so that every bookseller who sells "girlie" films is not labelled and liabled by prosecutors who have misread the case and who set themselves up as the judge of community standards.

Respectfully submitted,

BURTON MARKS

Attorney for Appellants

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

SCHACKMAN ET AL. *v.* CALIFORNIA.

APPEAL FROM THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES.

No. 995. Decided June 12, 1967.

PER CURIAM.

The judgment of the Superior Court of California, County of Los Angeles, is reversed. *Redrup* v. *New York*, 386 U. S. —, decided May 8, 1967.

THE CHIEF JUSTICE, MR. JUSTICE CLARK, and MR. JUSTICE BRENNAN would affirm the judgment of the lower court. *Ginzburg* v. *United States*, 383 U. S. 463.

MR. JUSTICE HARLAN adheres to the views expressed in his separate opinions in *Roth* v. *United States*, 354 U. S. 476, 496, and *Memoirs* v. *Massachusetts*, 383 U. S. 413, 455, and on the basis of the reasoning set forth therein would affirm.